T & TT Enterprise Sdn Bhd v Lembaga Pembangunan dan Lindungan Tanah

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-2–944 OF 2007
LOW HOP BING, ZAINUN ALI AND HASAN LAH JJCA
19 NOVEMBER 2008

Contract — Agency — Principal and agent — Power of attorney executed by land owner to enable developer to develop land under development agreement — Whether developer was defendant's attorney or agent in relation to contract for engineering works

Contract — Construction of terms of contract — Intention of parties — Power of attorney executed by land owner to enable developer to develop land under development agreement — Purposive approach — Whether power of attorney given for purpose of enabling developer carry out obligations under development agreement

The defendant, the registered owner of Lot 16 Block 1 Miri Concession Land District ('the land'), entered into a development agreement ('DA') with Arena Jernih ('the developer') to develop the land into an industrial, commercial and housing estate ('the project'). Thereafter the defendant executed a power of attorney ('PA') appointing the developer as its lawful attorney to, inter alia, engage, employ contractors concerning the planning and development of the project. The recital to the PA also expressly referred to the DA. In the exercise of its powers under the PA, the developer engaged the plaintiff to carry out certain engineering works ('the engineering works') on the land. However, the developer then suspended the engineering works and the plaintiff filed a claim against the defendant for damages and loss sustained by it as a result of the alleged breach of the agreement to carry out the engineering works that was entered into between the plaintiff and the developer as the defendant's attorney or agent. The High Court dismissed the plaintiff's claim on the grounds that there was no agency relationship between the defendant and the developer and that therefore the defendant could not be held liable for the plaintiff's loss and damage arising from the breach of the agreement. In this appeal against that decision the plaintiff submitted that the PA should be construed by reference to the four corners thereof and that this would involve a reference to the DA because the recital to the PA specifically included the DA as an integral part of the PA. The defendant contended that it was not

liable and adopted a conjunctive construction of the PA and the DA. The issue before the court in this appeal was whether upon a true construction of the PA and the DA the developer was an agent or attorney of the defendant in relation to the contract for the engineering works so as to render the defendant liable to the plaintiff for the loss suffered by it as a result of the developer's default.

Held, dismissing the appeal with costs:

(1) Upon a conjunctive construction of the DA and the PA it was clear that the contractual relationship was that of a joint venture agreement or arrangement between Arena Jernih as developer and the defendant as landowner. The defendant had granted the PA to Arena Jernih for the sole purpose of facilitating Arena Jernih to carry out the obligations expressly set out in the DA. The PA and the DA must therefore be construed in line with the purpose for which the authority was given by the defendant to Arena Jernih, and as necessary for that purpose, so as to include all incidental powers necessary or its effective execution. This purposive approach was consistent with s 17A of the Interpretation Acts 1948 and 1967 which expressly provide for the application of the purposive interpretation of written laws (see paras 22 & 24).

(2) The PA and in particular cl 16 of the DA clearly exclude the intention to create a principal-agent relationship between the defendant and Arena Jernih insofar as the engineering works were concerned. Hence, as a matter of law and fact, Arena Jernih was not an agent of the defendant vis a vis the transaction in question. As such, since the plaintiff had failed to establish that the defendant was in fact the principal, s 179 of the Contracts Act 1950 could not be invoked to make the defendant liable (see paras 23 & 25).

[Bahasa Malaysia summary

Defendan, pemilik berdaftar Lot 16 Blok 1 Miri Daerah Tanah Konsesi ('tanah tersebut'), memasuki perjanjian pembangunan ('PP') dengan Arena Jernih ('pemaju') untuk memajukan tanah tersebut kepada kawasan perumahan, komersial dan perindustrian ('projek tersebut'). Berikutan itu defendan telah menggunakan surat kuasa wakil ('SKW') untuk melantik pemaju sebagai wakil sahnya untuk, antara lain, mengambil, menggaji kontraktor-kontraktor berkaitan perancangan dan pembangunan projek tersebut. Sebutan permulaan kepada SKW juga dengan nyata merujuk kepada PP. Dalam menggunakan kuasanya di bawah SKW tersebut, pemaju telah mengambil plaintif untuk melaksanakan kerja-kerja kejuruteraan tertentu ('kerja-kerja kejuruteraan') atas tanah tersebut. Walau

bagaimanapun, pemaju kemudian telah menggantung kerja-kerja kejuruteraan tersebut dan plaintif telah memfailkan tuntutan terhadap defendan untuk ganti rugi dan kerugian yang dialami olehnya akibat daripada pelanggaran perjanjian yang dikatakan untuk melaksanakan kerja-kerja kejuruteraan yang telah dimasuki antara plaintif dan pemaju sebagai wakil atau ejen defendan. Mahkamah Tinggi telah menolak tuntutan plaintif atas alasan bahawa tiada hubungan agensi antara defendan dan pemaju dan oleh yang demikian defendan tidak boleh dianggap bertanggungjawab untuk kerugian dan kerosakan plaintif yang timbul daripada pelanggaran perjanjian tersebut. Dalam rayuan ini terhadap keputusan tersebut plaintif telah menghujahkan bahawa SWK patut ditafsirkan dengan merujuknya secara keseluruhan dan ini akan melibatkan rujukan kepada PP tersebut kerana sebutan permulaan kepada SWK tersebut secara khusus memasukkan PP tersebut sebagai keseluruhan bahagian SWK tersebut. Defendan menegaskan bahawa ia tidak bertanggungjawab dan menggunakan pentafsiran penghubung SKW dan PP. Isu di hadapan mahkamah dalam rayuan ini adalah sama ada atas pentafsiran sebenar SKW dan PP tersebut pemaju merupakan agen atau wakil defendan kepada kontrak untuk kerja-kerja kejuruteraan tersebut untuk menjadikan defendan bertanggungjawab kepada plaintif untuk kerugian yang dialami olehnya akibat kegagalan pemaju.

Diputuskan, menolak rayuan dengan kos:

(1) Berdasarkan pentafsiran penghubung SWK dan PP tersebut adalah jelas bahawa hubungan kontraktual adalah perjanjian atau urusan usahasama antara Arena Jernih sebagai pemaju dan defendan sebagai pemilik tanah. Defendan telah memberikan SWK dan PP tersebut kepada Arena Jernih bagi satu-satunya tujuan untuk memudahkan Arena Jernih melaksanakan kewajipan yang jelas ditetapkan dalam SWK tersebut. SKW dan PP tersebut hendaklah dengan itu ditafsirkan sejajar dengan tujuan yang mana kuasa tersebut telah diberikan oleh defendan kepada Arena Jernih, dan adalah perlu bagi tujuan tersebut, agar memasukkan kesemua kuasa sampingan yang perlu atau keberkesanan pelaksanaannya. Pendekatan bertujuan ini adalah konsisten dengan s 17A Akta Tafsiran 1948 dan 1967 yang jelas memperuntukkan permohonan untuk pentafsiran bertujuan undang-undang bertulis (lihat perenggan 22 & 24).

(2) SWK dan khususnya fasal 16 kepada PP tersebut dengan jelas mengecualikan niat untuk membentuk hubungan prinsipal-ejen antara defendan dan Arena Jernih setakat mana kerja-kerja kejuruteraan adalah berkaitan. Justeru itu, atas undang-undang dan fakta, Arena Jernih bukan ejen defendan berbanding dengan transaksi yang dipersoalkan.

Oleh itu, memandangkan plaintif telah gagal untuk membuktikan bahawa defendan sememangnya prinsipal, s 179 Akta Kontrak Akta 1950 tidak boleh digunakan untuk menjadikan defendan bertanggungjawab (lihat perenggan 23 & 25).]

Notes

For cases on construction of terms of contract generally, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3088–3198.

For cases on principal and agent, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2407–2408.

Cases referred to

Bryant, Powis and Bryant Ltd v LA Banque Du Peuple [1896] AC 170, PC (refd)

Glamour Green Sdn Bhd v AmBank Bhd & Ors & Another Appeal [2007] 3 CLJ 413, CA (refd)

Magnum Finance Bhd v Ling Sing Ping [1988] 2 MLJ 403, HC (refd)

Mars Equity Sdn Bhd v Tis 'ATA' Ashar Sdn Bhd [2006] 4 MLJ 302; [2005] 1 CLJ 513, CA (refd)

Mohamed Isa & Ors v Abdul Karim & Ors [1970] 2 MLJ 165, HC (refd)

Watteau v Fenwick [1893] 1 QB 346, HC (refd)

Legislation referred to

Contracts Act 1950 s 179

Contracts Act [India] s 226

Interpretation Acts 1948 and 1967 s 17A

Appeal from: Suit No 22–51 of 2002 III(1) (High Court, Kuching)

MS Sandhu (Bong Ah Loi with him) (Suhaili & Bong Advocates) for the appellant.

Keong Yi (Yi & Co Advocates) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

[1] After a full trial, the learned judge of the Kuching High Court ('the trial judge') dismissed the appellant's ('the plaintiff's') claim with costs. This is the plaintiff's appeal against that decision.

THE PLAINTIFF'S CLAIM

[2] The plaintiff's claim against the respondent ('the defendant') is for damages and loss sustained by the plaintiff as a result of an alleged breach of

agreement entered into between the plaintiff and Arena Jernih Sdn Bhd ('Arena Jernih') as the defendant's attorney or agent for the supply of engineering works, thereby making the defendant primarily liable for RM230,019.75 due under a payment certificate, RM36,767.75 (ie RM11,210 plus RM25,557.75 being retention monies), RM30,000 being costs of standby machinery, and damages to be assessed, in addition to interest and costs.

FINDING OF FACTS BY TRIAL JUDGE

[3] At all material times, the defendant was the registered owner of the land known as 'Lot 16 Block 1 Miri Concession Land District' ('the land').

[4] The defendant entered into a development agreement dated 22 July 1994 with Arena Jernih ('the DA') to develop the land into an industrial, commercial and housing estate ('the project'). Subsequently, on 8 August 2000, the defendant and Arena Jernih entered into a variation agreement.

[5] By power of attorney dated 26 June 1996 and registered at the Miri Land Registry as Instrument No L6200/1996 ('the PA'), the defendant appointed Arena Jernih as its lawful attorney to do the acts, matters, deeds and things as specified therein. The recital to the PA expressly referred to the DA. The PA included, under cl (11) thereof, the power to engage, employ, inter alia, contractors concerning the planning and development of the project.

[6] On or about 14 September 2000, Arena Jernih engaged the plaintiff to carry out certain engineering works on the land.

[7] However, on 22 December 2000, Arena Jernih suspended the engineering works.

[8] Instead of suing Arena Jernih, the plaintiff filed a claim against the defendant.

[9] In dismissing the plaintiff's claim, the trial judge held that:

(1) Upon a true construction of the PA and the DA, the PA was given for the purpose of facilitating Arena Jernih to carry out its obligations under the DA; and

(2) There was no agency relationship between the defendant and Arena Jernih and so the defendant could not be held liable for the plaintiff's loss and damage arising from the supply of engineering works by the plaintiff to Arena Jernih.

AGENCY RELATIONSHIP

[10] Learned counsel Mr MS Sandhu (assisted by Mr Bong Ah Loi) in attributing liability to the defendant submitted for the plaintiff that the PA should be construed within the four corners thereof. For this proposition, they relied on:

(1) *Bryant, Powis and Bryant Ltd v LA Banque Du Peuple* [1896] AC 170 (PC);

(2) *Chitty on Contracts* (28 Ed) (1999) Vol para 12.063; and

(3) *Bowstead on Agency* (13th Ed) at p 65.

[11] Mr Keong Yi, learned counsel for the defendant, preferred a conjunctive construction of the PA and the DA, to support his contention that the defendant is not liable. He drew the court's attention to:

(1) *Magnum Finance Bhd v Ling Sing Ping* [1988] 2 MLJ 403 (HC); and

(2) *Glamour Green Sdn Bhd v Ambank Bhd & Ors & Another Appeal* [2007] 3 CLJ 413 (CA).

[12] Although the above submissions appear to be at variance with each other, a closer analysis reveals a common ground. Construing the PA by reference to the four corners thereof would involve a reference to the DA as well. This is because the recital to the PA has specifically and expressly included the DA as an integral part of the PA. On the other hand, a conjunctive construction of the PA and the DA would also involve a combined reference to these two documents. Hence, both the PA and the DA are called into question here. *It is trite law that where in a transaction more than one document or instrument is involved, the courts usually construe those documents together: Glamour Green Sdn Bhd*; *Mohamed Isa & Ors v Abdul Karim & Ors* [1970] 2 MLJ 165 (HC) and *Mars Equity Sdn Bhd v Tis 'ATA' Ashar Sdn Bhd* [2006] 4 MLJ 302; [2005] 1 CLJ 513 (CA).

[13] The 'four-corner' construction as applied by eg, Lord Macnaghten in *Bryant, Powis and Bryant Ltd* and the conjunctive construction as enunciated

in *Glamour Green Sdn Bhd*; *Mohamad Isa & Ors* and *Mars Equity Sdn Bhd* in the context of the PA and the DA herein, practically share a common denominator.

[14] Where the parties' intention is clearly and unequivocally expressed in eg, the PA and the DA, the court will give effect to it: *Chitty on Contract.*

[15] Now, the parties' submissions have raised the following question for determination:

> Upon a true construction of the PA and the DA, in relation to the contract for the supply of engineering works by the plaintiff to Arena Jernih, is Arena Jernih an agent ie attorney of the defendant so as to render the defendant liable to the plaintiff for the damage and loss suffered by the plaintiff as a result of Arena Jernih's default?

[16] This question is one of mixed law and fact.

[17] In law, where a party enters into a contract as an agent of the principal, s 179 of the Contracts Act 1950 would apply. Section 179 provides for the enforcement of the agent's contract against the principal in the following words:

> 179 Enforcement and consequences of agent's contracts.
>
> Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.

[18] Section 179 renders a principal liable for the act of his agent. As between the principal and third persons, the contract or act of the agent is one which is binding on the principal: see the commentary on s 226 (equipollent to our s 179) *Pollock and Mulla on Indian Contracts and Specific Relief Acts,* 12th Ed, at p 2290 (see also *Bryant, Powis and Bryant Ltd* per Lord MacNaghten at p 180).

[19] In order to successfully invoke the law contained in s 226 in India and in our s 179, it is incumbent on the plaintiff to establish that the defendant is in fact the principal, failing which, the defendant cannot be made liable therefor: see *Watteau v Fenwick* [1893] 1 QB 346 (HC) per Wills J.

[20] The relevant recital to the PA makes it abundantly clear that the PA was granted pursuant to the DA. It merits reproduction as follows:

NOW THIS DEED WITNESSETH that pursuant to a Development Agreement entered between the Appointor and Appointee hereof on 22 July 1994 ('the Development Agreement'), we do hereby appoint Arena Jernih Sdn Bhd (NON-NATIVE) a company incorporated under the Companies Act, 1965 and having its registered address at Lot 559, 3rd Floor, Jalan Permaisuri, 98000 Miri, Sarawak ('the Appointee') to be our lawful Attorney from the date hereof either jointly and severally to do all or any of the following acts, matters, deeds and things.

[21] Under cl 1 of the DA, the defendant had appointed Arena Jernih as the developer to develop the land.

[22] Clause 12 thereof states that after developing the defendant's land, the developer (ie Arena Jernih) has the obligation to give certain number of buildings to the landowner (the defendant). Upon a conjunctive construction of the DA and the PA, it is clear that the contractual relationship is that of a joint venture agreement or arrangement between Arena Jernih as developer and the defendant as landowner.

[23] Clause 16 stipulates that the developer (Arena Jernih) shall be responsible for all works necessary in connection with the development of the land, and 'shall bear all costs and expenses incurred for the implementation'.

[24] The DA (expressly referred to in the PA) was entered into between the defendant and Arena Jernih specifically 'for and on the development of the land' in consideration of *cash payment basis or partly in kind or barter trade basis.* The defendant has granted the PA to Arena Jernih for the sole purpose of facilitating Arena Jernih to carry out the obligations expressly set out in the DA. The 'barter trade' was further confirmed in the oral testimony of Ateng Jeros (DW 1) at the trial. The PA and the DA must therefore be construed in line with the *purpose for which the authority is given by the defendant to Arena Jernih, and as necessary for that purpose, so as to include all incidental powers necessary for its effective execution*: see *Magnum Finance Bhd* and *Bowstead on Agency*. This purposive approach is consistent with s 17A of the Interpretation Acts 1948 and 1967 which expressly provide for the application of the purposive interpretation of written laws.

[25] Nothing can be clearer than cl 16 of the DA that Arena Jernih 'shall bear all the costs and expenses incurred for the implementation' of the project. The oral testimony, the PA and the DA clearly exclude the intention to create a principal-agent relationship between the defendant and Arena Jernih in so far as the engineering works are concerned. Hence, as a matter of law and fact, Arena Jernih is not an agent of the defendant vis-à-vis the

transaction in question. That being the case, s 179 is inapplicable here and so the defendant is not liable thereunder.

[26] A substantially similar factual matrix arose in *Magnum Finance Bhd* where the facts reveal that a joint venture agreement was executed between the land owner and the developer. A power of attorney was executed to enable the land owner to surrender the land to the developer for development of a housing project, and the land owner was entitled to 30% of every class of buildings to be constructed on the land. The costs of development was to be borne by the developer who was entitled to the balance of 70% of the buildings erected thereon. Siti Norma Yaakob J (later CJ (Malaya)) held, inter alia, that the PA there was merely limited to the joint venture and to carry into effect the terms and conditions thereof.

CONCLUSION

[27] For reasons given above, the answer to the above question is in the negative. There is no merit in this appeal. It is hereby dismissed with costs. The decision of the trial judge is affirmed. Deposit to the defendant on account of taxed costs.

Appeal dismissed with costs.

Reported by K Nesan